UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

GENERAL COUNSEL

July 22, 2011
L-2011-06

Mr. [redacted]
Assistant Vice President
General Claims Department
BNSF Railway Company
[redacted]

In reply refer to
C. 2011-3617

Dear Mr. [redacted]:

This is in reply to your letter of June 24, 2011, wherein you asked the Railroad Retirement Board (RRB) to modify the factors it considers when determining whether to waive all or a portion of the RRB's lien under section 12(o) of the Railroad Unemployment Insurance Act (RUIA).

More specifically, you asked that the RRB not allow the 12(o) lien amount to be reduced by the amount of medical expenses that are paid on the employee's behalf pursuant to a Health and Welfare Agreement ("Agreement") entered into by rail management and rail labor on October 22, 1975. That Agreement provides in relevant part that:

> In the case of an injury or a sickness for which an Employee who is eligible for Employee benefits and may have a right of recovery against the employing railroad, Benefits will be provided under the Policy Contract, subject to the provisions hereinafter set forth. The parties hereto do not intend that benefits provided under the Policy Contract will duplicate, in whole or in part, any amount recovered from the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the Policy Contract, and they intend that benefits provided under the Policy Contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits provided. Accordingly, benefits provided under the Policy Contract will be offset against

> any right of recovery the Employee may have against the employing railroad for hospital, surgical, medical or related expenses for any kind specified in the Policy Contract. (Art. III, Sec. A.).

Section 341.5(b) of the RRB's regulations specifies the expenses that may be subtracted from the amount of damages recovered in calculating a 12(o) lien:

> "(1) The medical and hospital expenses that the employee incurred because of his or her injury. These expenses are deductible even if they are paid under an insurance policy covering the employee or are covered by his or her membership in a medical or hospital plan or association. But such expenses are not deductible if they are not covered by insurance or by membership in a medical or hospital plan or association and are consequently paid by a railroad or other person directly to the doctor, clinic or hospital that provided the medical care or services.
>
> (2) The cost of litigation. This includes both the amount of the fee to which the attorney and the employee have agreed and the other expenses that the employee incurred in the conduct of the litigation itself." [20 CFR 341.5(b)(1) and (2)].

You have explained that when an employee's medical expenses are paid for pursuant to the Agreement, the insurance company United Healthcare pays the medical service providers directly. The insurance is funded solely by BNSF. Thus, although BNSF does not pay the medical expenses directly to the providers of those services, it does pay the full cost of the insurance obtained to fund the railroad's liability for medical expenses resulting from the employee's injury or illness where the employee may have a right of recovery against the railroad.

The question then becomes whether payment of medical expenses by an insurance policy fully paid for by the railroad for the purpose of funding the railroad's liability for medical expenses resulting from employee injury or illness should be considered the equivalent of payment of medical expenses directly by the railroad.

A railroad's liability for an employee's injury would generally be determined under the provisions of the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) (FELA). That Act contains the following provision:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought

> against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." 45 U.S.C. §55.

While section 55 in effect prohibits a railroad from exempting itself from liability under the FELA, it anticipates that a railroad may insure itself to cover liability under FELA and allows the railroad to set off amounts paid for such insurance from an amount paid to an employee who brought an action under FELA. The issue of whether benefits paid pursuant to such insurance should be set off from money due to the injured employee in an FELA action has been addressed by several courts. According to the U.S. Court of Appeals for the Ninth Circuit:

> "In dealing with this issue both in the railroad and maritime cases, courts have been virtually unanimous in their refusal to make the source of the premiums the determinative factor in deciding whether the benefits should be regarded as emanating from the employer or from a 'collateral source'. Rather, courts have tried to look to 'the purpose and nature of the fund and of the payments' and not merely at their source." Folkestad v. Burlington Northern, Inc., 813 F.2d 1377, 1381 (9th Cir. 1987).

In the Folkestad decision, the Ninth Circuit discussed whether the insurance should be treated as a fringe benefit in part compensation for the employee's work. The Court noted that if the insurance is viewed as the product of the employee's labors, it is deemed to come from a source collateral to the employer rather than from the employer. Setoff in that instance would permit avoidance of FELA liability and such avoidance is prohibited by 45 U.S.C. § 55, 813 F.2d at 1381. The Court then noted that if the insurance is viewed as a contribution by the employer intended to fulfill FELA obligation, it would appear to fall within the proviso of 45 U.S.C. § 55 and setoff should be permitted. The Court considered the fact that the 1975 Health and Welfare Agreement between railroads represented by the National Carriers' Conference Committee and railroad employees represented by the Brotherhood of Maintenance of Way Employees, which contained a provision almost identical to the Agreement provision quoted at the beginning of this letter, expressly provided for setoff. Because the agreement between the railroad and the union was clear, the Court held that the amount of the FELA judgment should be reduced by the amount of the insurance benefits paid pursuant to the collective bargaining agreement.

Two other Federal Circuit Courts of Appeals have reached the same conclusion with respect to setoff. See Clark v. Burlington Northern, Inc. , 726. F.2d 448 (8th Cir. 1984), wherein the Court found that the railroad employer clearly intended to make a voluntary disability plan supplemental to sums recovered under the FELA and allowed setoff; and Burlington Northern Railroad Company v. Strong, 907 F. 2d 707 (7th Cir. 1990), wherein the Court found that benefits paid pursuant to a Supplemental Sickness Benefit Agreement, which provided that the Supplemental Sickness Benefits (SSB) received by employees would not duplicate recovery of lost wages, could be set off from the amount of a FELA award. The Seventh Circuit Court wrote that, "We agree with our colleagues in the Eighth and Ninth Circuits that section 55 is not violated by an indemnity program agreed to between the union and the employer that allows the employer to deduct certain amounts from a FELA award. Section 55 was designed to prevent employers from receiving a windfall but not, as the Eighth Circuit points out, to 'deter them from voluntarily paying monthly disability payments in lieu of wages to disabled workers'" 907 F.2d at 714, quoting Clark, 726 F.2d at 451.

It is my opinion, based on the discussion set out in this letter, that the RRB should not allow the amount of its 12(o) lien to be reduced by the amount of medical expenses that are paid on an injured employee's behalf pursuant to the Health and Welfare Agreement (the Agreement) entered into by rail management and rail labor on October 22, 1975 because that Agreement is clear that rail management and rail labor have agreed that the amount of a FELA award should be reduced by the amount of the insurance benefits paid pursuant to the Agreement. I find further that this conclusion is consistent with the last sentence of section 341.5(b)(1) of the RRB's regulations, as the "insurance" cited therein refers to a fringe benefit provided as part of an employee's compensation paid by an employer and not to insurance purchased to indemnify a railroad employer against FELA liability.

A copy of this opinion is being released to the RRB's Office of Programs so that appropriate procedures may be developed to apply the conclusion reached herein on a prospective basis. See 20 CFR 261.3.

Sincerely,

[redacted]
General Counsel

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